STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 20, 2007
v	No. 265388 Oakland Circuit Court
KEVIN SCOTT PHIPPS, Defendant-Appellant.	LC No. 2004-199210-FH

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). Defendant was sentenced to two years' probation with the first nine months to be served in jail. We affirm.

I. Basic Facts

The complainant is an 18-year-old student who plays high school and Amateur Athletic Union ("AAU") girls' basketball. Defendant is a 36-year-old high school and Amateur Athletic Union ("AAU") girls' basketball coach, but not the complainant's coach. In September 2004, the complainant and several of her friends planned to carpool to a basketball game in Kalamazoo. On the day of the game, none of the complainant's friends could attend, and the complainant was not allowed to drive the family car. Eventually, a friend indicated that the complainant could ride with defendant, whom the complainant was familiar with from the basketball circuit. After talking on the phone, defendant picked up the complainant from her West Bloomfield home.

The complainant testified that, while driving to the game, defendant indicated that he wanted to get to know her better and suggested they get a hotel room for the night in Kalamazoo. The complainant indicated that she no longer wanted to go to Kalamazoo and defendant turned around to return home, but used a different route. The complainant asked to go home, but defendant said that he wanted to find someplace "to hang out" with her. While driving, defendant allegedly spoke to the complainant about sexual topics. The two thereafter went to a Wendy's restaurant where defendant told the complainant that he was a masseuse. Defendant also offered to get a room for the complainant's friends.

After leaving the restaurant, the complainant and defendant drove to a Red Roof Inn in Southfield. While in the car, the complainant asked defendant to pick up her 17-year-old friend, NC.[1] Defendant drove to the hotel and, after paying for a room and retrieving a key, asked the complainant to come inside to look at the room before they picked up NC. Once in the room, defendant pulled the complainant next to him on the bed, and began massaging her shoulders. Defendant then pushed the complainant down on her stomach and massaged the complainant's back underneath her shirt and, despite the fact that the complainant told defendant she was uncomfortable, undid the complainant's jeans, pulled them down, and started massaging around her buttocks. The complainant told defendant to stop and, when she looked back, she saw defendant licking her butt. The complainant rolled off the bed to end the physical contact, and began crying. The complainant testified that defendant became upset, and asked if she was going to tell anyone as he walked toward her. The complainant said that she would not tell, and she and defendant drove to pick up NC from a house in Detroit. Defendant then drove to the hotel room, gave the complainant the key, and left. Several days later, the complainant told her parents, and the matter was reported to the police.

II. Inadmissible Hearsay

Defendant first argues that he was denied a fair trial by the admission of statements made by the complainant to NC after the alleged sexual assault. We disagree.

Because defendant did not object to the evidence at trial, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802. The excited utterance exception permits the admission of statements that (1) arise out of a startling event, and (2) are made while the declarant was under the excitement caused by that event. MRE 803(2); *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999), aff'd 464 Mich 756 (2001). The focus of the excited utterance rule is the "lack of capacity to fabricate, not the lack of time to fabricate," and the relevant inquiry is one concerning "the possibility for conscious reflection." *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998), cert den 540 US 971; 124 S Ct 441; 157 L Ed 2d 319 (2003). The length of time between the startling event and the statement is an important factor to consider in determining admissibility, but it is not dispositive. *Id.* Rather, the key question is whether the declarant was still under the stress of the event, and the trial court is accorded wide discretion in making that preliminary factual determination. *Id.* at 551-552; see also *Layher, supra*.

NC testified that after she and the complainant entered the hotel room, the complainant told her that defendant had massaged, touched, and licked her back and buttocks, and that she told him to stop. The complainant's statements were made after a startling event, i.e., a sexual

[1] NC was also familiar with defendant from seeing him at AAU events.

assault. Defendant essentially asserts that too much time elapsed between the time of the incident and the complainant's statements to NC because the complainant had other opportunities to tell NC what had occurred. Despite the passage of time before the complainant made the statements, the relevant inquiry is whether the complainant was still under the overwhelming influence of the event when she made the statements. *Smith*, *supra* at 551-552. The evidence indicated that immediately after the complainant, a high school student, closed the hotel room door, she "started crying." NC described the complainant as "startled" and "crying." Thus, there was evidence that the complainant was still under the stress caused by the event.[2] As noted by the trial court,[3] defendant "was always nearby" "during those 'other opportunities'" that the complainant could have told NC. Because it is not plainly apparent that the challenged testimony could not have been received successfully and correctly under MRE 803(2), defendant has failed to demonstrate plain error in this regard. Defendant therefore is not entitled to appellate relief.

III. Prior Consistent Statements

Defendant also argues that he is entitled to a new trial because the prosecutor bolstered the complainant's testimony by eliciting improper hearsay evidence leading the jury to believe that the complainant's prior statements to her bishop and her mother were consistent. We disagree. Because defendant did not object to the testimony below, we review this claim for plain error affecting substantial rights. *Carines*, *supra*.

No one may bolster a witness's testimony using that witness's prior consistent statements unless the statements fall under a hearsay exception, or are not admitted as substantive evidence. MRE 801(d)(1)(B); *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987).

Here, the testimony was not elicited to prove the truth of the matter asserted, i.e., that defendant sexually assaulted the complainant. Rather, the testimony was offered to present a chronology of events that led to the disclosure to the police. The evidence showed that the complainant did not immediately tell her parents what had occurred, and that there was a delay in reporting the incident to the police. During trial, the prosecutor elicited from the complainant's bishop and mother that she had told them consistent stories, which ultimately led to the proceedings in this case. The complainant's bishop testified that about a week after the incident, the complainant made a counseling appointment with him. As a result of what she told him, he encouraged her to talk to her parents. The complainant's mother testified that their bishop contacted them and, after speaking with the complainant, they reported the matter to the police. When the prosecutor questioned the witnesses, she cautioned them not to indicate what the

[2] In *Smith*, *supra* at 552, our Supreme Court held that a sexual assault victim's statement, made over ten hours later in response to questioning by the victim's mother, was an excited utterance where the evidence showed that the victim "was still under the overwhelming influence of the assault."

[3] The trial court addressed this issue in the context of deciding defendant's posttrial motion for a new trial based on ineffective assistance of counsel, which the trial court denied.

complainant told them. Neither the bishop nor the complainant's mother revealed the content of the complainant's statements to them.

Further, even if the testimony could be considered as improper bolstering, defendant has not demonstrated a plain error affecting his substantial rights. *Carines*, *supra*. In brief, it is highly unlikely that the complainant's bishop's and mother's testimony disclosing the events that led to the court proceeding caused the jury to convict an otherwise innocent person. *Id.* The complainant testified at trial regarding the alleged acts. Moreover, as aptly noted by the trial court, "defendant's defense was complete denial, that is, that the story, no matter how many times told, was false." Consequently, defendant is not entitled appellate relief.

IV. Jury Instructions

Defendant next argues that he is entitled to a new trial because the trial court failed to sua sponte instruct the jury on the defense of consent. We decline to review defendant's challenge to the jury instructions because the record reflects that defense counsel expressed satisfaction with the trial court's instructions. Defendant's affirmative approval of the instructions waived any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144, reh den 463 Mich 1210 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001), lv den 467 Mich 854 (2002).

V. Prosecutorial Misconduct

Next, defendant argues that the prosecutor's conduct denied him a fair trial. We disagree.

This Court reviews preserved claims of prosecutorial misconduct case by case, examining the challenged remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659, reh den 448 Mich 1225 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002), lv den 468 Mich 880 (2003).

During trial, NC testified that, over the phone, she heard defendant ask the complainant if they could be "friends with benefits." The prosecutor asked NC if that phrase had "any meaning to [her]." Defense counsel objected on relevancy and speculation grounds. The trial court asked if the phrase was colloquial, sustained the objection, and directed the prosecutor to lay a foundation for the testimony. Defendant challenges the following emphasized question asked by prosecutor in the subsequent exchange about the meaning of "friends with benefits":

Q. The term "friends with benefits," is that a common phrase that you know of?

A. Yes.

Q. You have heard it used before?

A. Yes.

Q. It's not something you, yourself, use only, but it's out there in the community?

A. Yes

Q. And friends with benefits, does that have a sexual connotation to it?

A. Yes, it does.

A prosecutor may not inject himself into trial as a witness. See *Rodriguez, supra* at 35. Further, MRE 611(c)(1) states that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." To warrant reversal based on a prosecutor's use of leading questions, the defendant must show "'some prejudice or pattern of eliciting inadmissible testimony.'" *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411, lv den 465 Mich 933 (2001) (citation omitted). Reversal is required if the defendant was prejudiced by the leading questions. *Id.*

We agree that the prosecutor should not have provided a meaning for the colloquial phrase within his question. But viewed in context, the challenged question does not warrant reversal. Although the prosecutor's question used the words "sexual connotation," NC had already testified that defendant was "making sexual preferences" [sic] toward the complainant. Further, because this was a sexual assault case, it is apparent that NC mentioned defendant's use of the phase because of its sexual suggestion. Thus, the jury was not exposed to an unrelated reference. Even without the prosecutor's leading question, NC had already testified that she was familiar with the phrase and her definition could have been equally or more descriptive than the mild description suggested by the prosecutor. Moreover, defense counsel had the opportunity to cross-examination NC about the phrase, and could have asked her to provide a definition in her own words. In sum, because defendant cannot show that he was prejudiced by the prosecutor's conduct, reversal is not warranted.

VI. Ineffective Assistance of Counsel

Defendant contends that a new trial is required because defense counsel was ineffective, or alternatively, that remand is necessary to enable him to develop this claim. We disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

We reject defendant's claim that defense counsel was ineffective for failing to object to the opinion testimony of the complainant's 17-year-old friend, SS, that the complainant was an honest person, and for stipulating that if SS's twin sister testified, her testimony would be consistent with SS's testimony. It is improper for a witness to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985). However, "[w]here a defense counsel attacks a witness' character for truthfulness in an opening statement, the prosecution may present evidence that supports the witness' character for truthfulness on direct examination." *People v Lukity*, 460 Mich 484, 489; 596 NW2d 607 (1999).

Here, defendant's defense was that the incident did not occur. During opening statement, defense counsel questioned the credibility of the evidence and the complainant. Because it was

not improper for the prosecutor to elicit testimony regarding the complainant's honesty on direct examination, defense counsel was not ineffective for failing to object. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502, lv den 463 Mich 855 (2000) (counsel is not required to advocate a meritless position). Additionally, it was reasonable trial strategy for defense counsel to stipulate to the testimony of SS's sister, as opposed to presenting another witness to the jury to reiterate that the complainant was an honest person.

We also reject defendant's claims that defense counsel was ineffective for failing to object to the unpreserved claims of errors discussed in parts II and III. In light of our conclusion that these alleged errors did not affect defendant's substantial rights, i.e., were not prejudicial, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger*, *supra*. Therefore, he cannot establish a claim of ineffective assistance of counsel.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's repeated use of leading questions. Defendant correctly asserts, and plaintiff concedes, that the prosecutor asked numerous leading questions during trial. But apart from listing the citations to the leading questions and making general comments, defendant has failed to show "'some prejudice or pattern of eliciting inadmissible testimony.'" *Watson*, *supra*. As noted by the trial court when denying defendant's motion for a new trial on this basis, the prosecutor could have elicited the same testimony through other questions. Consequently, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's actions, the result of the proceeding would have been different. *Effinger*, *supra*.

Defendant additionally argues that defense counsel was ineffective for failing to object to NC's general conclusory remark that defendant was making "sexual preferences" [sic] toward the complainant because it was for the jury to determine the intent of defendant's statements. NC testified that she heard defendant making "sexual preferences" [sic] to the complainant while in the car, but she could not recall the specific statements that defendant made. Given the context and extent of NC's testimony, we disagree with defendant's claim that the challenged remark was the equivalent of NC determining defendant's "thought processes." Moreover, it is highly unlikely that, but for defense counsel's failure to object to the remark, the result of the proceeding would have been different. *Effinger*, *supra*.

We also reject defendant's claim that defense counsel was ineffective for failing to object to the complainant's mother testifying because she was never listed on the prosecution's witness list. It is undisputed that the complainant's mother was not listed on the prosecution's witness list. Further, at the beginning of trial, the prosecutor named the witnesses he intended to call, which did not include the complainant's mother, although she was the first witness. Defendant does not claim, however, that he was surprised by the witness, or that he would have done anything differently had the witness been listed. Defendant only argues that defense counsel should have objected. But defendant has failed to demonstrate, or even argue, that, had defense counsel objected to the complainant's mother as a witness, it would have been successful. The trial court had discretion to allow the prosecutor to add the witness, given that the absence was an oversight and the parties were familiar with the witness. See MCL 767.40a(4). Mere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved. *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501, lv den 469 Mich 950 (2003). Consequently, defendant cannot demonstrate that, but for

defense counsel's failure to object, the result of the proceeding would have been different. *Effinger, supra*.

Defendant also argues that defense counsel was ineffective for failing to call several character witnesses. The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). A trial counsel's decision concerning what witnesses to call is a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994), lv den 450 Mich 979 (1996). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey, supra* at 76-77.

Defendant has not demonstrated how the proffered witnesses were valuable to his defense, or overcome the presumption that defense counsel reasonably decided not to present the witnesses. Although character evidence regarding defendant's general law-abiding, peaceful, and moral character toward teenaged girls may have portrayed defendant in a different light, it is unlikely that the evidence would have countered the testimony presented by the complainant and NC regarding the incident. Further, injecting character into a trial generally opens the door to the prosecutor's rebuttal of that evidence. See MRE 404(a)(1). In fact, during trial, the trial court precluded evidence that defendant had repeatedly called a 17-year-old girl, requested to come to her house when she was alone, and cautioned her not to tell anyone that they had conversed. The court noted that it would revisit the issue depending on what was presented during defendant's case. Additionally, because defendant's proposed character witnesses had no personal knowledge of the charged conduct, this case is distinguishable from cases where counsel failed to discover and present witnesses who could have directly contradicted the prosecution's case. See, e.g., *People v Grant*, 470 Mich 477; 684 NW2d 686 (2004), and *People v Johnson*, 451 Mich 115, 118-120; 545 NW2d 637 (1996). For these reasons, defendant has not demonstrated that defense counsel was ineffective for failing to call character witnesses.

Defendant finally claims that defense counsel was ineffective for failing to present a defense of consent. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). However, defendant has not overcome the presumption that defense counsel's decision not to pursue a defense of consent was reasonable trial strategy. The defense was that the complainant and NC were being untruthful, and that defendant did not commit the charged crime. Defense counsel could have reasonably surmised that presenting a defense of consent, i.e., that defendant, a 36-year-old high school coach, took a consenting high school student to a motel room and engaged in sexual contact with her, would have been detrimental. As previously indicated, we will not second-guess counsel in matters of trial strategy, and the fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Further, regarding the presented defense of fabrication, defendant effectively cross-examined the complainant and NC, and raised questions regarding their credibility. For

example, defense counsel highlighted inconsistencies in the complainant's testimony, and questioned her failure to contact anyone by cell phone to retrieve help or to be picked up while she was with defendant. Also, during cross-examination, the complainant admitted that defendant left her in the car for ten minutes, yet she did not call her parents or leave the car. Defense counsel also questioned NC about her willingness to get into the car with defendant even though the complainant had supposedly indicated that she was uncomfortable with him. In sum, defendant has not demonstrated that defense counsel was ineffective for failing to present a defense of consent.

Defendant summarily argues that remand is necessary to develop his claim that defense counsel was ineffective. Defendant has not identified what useful factual information could potentially be obtained at an evidentiary hearing. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

For these reasons, we reject defendant's claim that defense counsel was ineffective and are not persuaded that a remand is necessary.

VII. Cumulative Error Theory

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999), lv den 461 Mich 966 (2000).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Alton T. Davis
/s/ Deborah A. Servitto